habitual criminal;[26] and since the object of the statutes providing for cumulative sentences for second offenses is not to impose an additional punishment for the former crime, but to punish the habitual criminal for his disposition to wilfully disregard the law,[27] the decision of the principal case seems entirely satisfactory. Moreover, this view would in the majority of cases effectuate the intention of the executive in forgiving the first offense, for though at the time of granting the pardon he evidently considered the offender worthy of restoration to his civil rights, he would undoubtedly have been of a different opinion had he suspected that the applicant for clemency possessed habitually criminal tendencies.

CONSTITUTIONALITY OF THE SHERMAN ANTI-TRUST ACT AS A CRIMINAL STATUTE.—It is a recognized rule of criminal law that in order to sustain an indictment under a penal statute the crime must be so clearly defined that all men subject to the penalty may know what acts it is their duty to avoid.[1] The courts of America upon one theory or another have regarded this principle as included in the requirements which the Constitution of the United States imposes upon criminal legislation. Perhaps the most satisfactory basis for this result is that the enactment of a law so indefinite that its terms require definition by the jury constitutes in fact a delegation of legislative power to the judiciary,[2] and thus is contrary to the spirit of our institutions. Such statutes have also been condemned as depriving persons of liberty or property without due process of law,[3] or as contrary to the sixth amendment in that the accused is not duly apprised of the nature of the accusation against him.[4]

As long as the Supreme Court of the United States insisted upon a construction of the Sherman Anti-trust Act, which, by strict adherence to the letter of that measure, condemned all agreements or combinations in restraint of trade,[5] there could, of course, be no question as to its validity so far as concerns the objection of uncertainty. But when the decisions in the *Standard Oil Case*[6] and the *American Tobacco Case*[7] introduced the "rule of reason" into the interpretation of the Statute, and held that only such combinations come within the ban of the Act as are in unreasonable restraint of trade, the question presented in *United States* v. *Patterson* (1912) 201 Fed. 697 immediately arose. The defendants in this criminal proceeding under the Statute set up that it was unconstitutional because uncertain. The

[26]People *v.* Raymond (1884) 96 N. Y. 38; People *v.* Price *supra;* Mount *v.* Commonwealth *supra.*

[27]People *v.* Raymond *supra.*

[1]Tozer *v.* U. S. (1892) 52 Fed. 917; see also U. S. *v.* Brewer (1891) 92 U. S. 278; Ballew *v.* U. S (1893) 160 U S. 187.

[2]L. & N. R. R. *v.* Commission (1884) 19 Fed. 679; U. S. *v.* Reese (1875) 92 U. S. 214.

[3]L. & N. R. R. Co. *v.* Commission (1896) 99 Ky. 132.

[4]U. S. *v.* Traction Co. (1910) 34 App. D. C. 592; Czarra *v.* Supervisors (1905) 25 App. D. C. 443.

[5]See Northern Securities Co. *v.* U. S. (1903) 193 U. S. 197; U. S. *v.* Freight Assn. (1897) 166 U. S. 290.

[6]Standard Oil Co. *v.* U. S. (1911) 221 U. S. 1.

[7]U. S. *v.* American Tobacco Co. (1911) 221 U. S. 106.

District Court denied this contention; but the question, in the absence of final adjudication, is still an open one.

If the question of unreasonableness, which now must always be determined in order to sustain a conviction, were a question for the jury to decide, it would be difficult to uphold the constitutionality of the Statute. It is submitted, however, that under the decision in the *Standard Oil Case,* it is not a question for the jury, but purely a matter of law. That case expressly refers to the standard of unreasonableness which the common law applied to restraints of trade. If that standard can be shown to have a fixed and definite meaning by which one may guide his conduct, the constitutionality of the Act must stand unquestioned.[8]

Reasonableness as applied to restraints of trade has at common law acquired a fixed and definite meaning. The development was a gradual one. Originally all restraints of trade were void regardless of the extent of the area affected. So it was held that if the vendor of a business agreed not to re-engage in the trade in the same city, though reserving the right to trade elsewhere, the vendee could not enforce the contract, for it was void as against public policy.[9] The courts soon took a broader view, ruling that unless the restraint extended throughout the nation it was reasonable and legal.[10]. That rule, however, proved too arbitrary to be satisfactory. As a consequence, the common law both in England and in America developed the rule that a restraint of trade imposed upon the vendor of a business and good will by his vendee is reasonble regardless of the extent of the territory affected, if co-extensive with the interest to be protected and with the benefit intended to be conferred.[11] The common law does not present any other test of reasonableness.[12]

Since the Sherman Anti-trust Act is to be interpreted in the light of this rule of the common law, it would seem that the "rule of reason" means only that those acts whose direct effect is to monopolize or to tend to monopolize come within the condemnation of the Statute, while acts which result in merely collateral restraint do not.[13] Thus, it is said in the *Standard Oil Case* that the common law, and therefore, inferentially at least, the Anti-trust Act, condemned only those contracts or acts "which had not been entered into or performed with a legitimate purpose of reasonably forwarding personal interest and developing trade, but on the contrary were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals."[14] So defined the degree of unreasonableness which makes an act illegal under the Statute seems sufficiently fixed and definite to render the validity of the Statute unassailable on the ground of uncertainty.

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[8]See Oil Co. *v.* Texas (1908) 212 U. S. 86.

[9]Colgate *v.* Bacheler (1601) 1 Cro. Eliz. 872; John Dier's Case (1415) Y. B. 2 H. 5 Fol. Pl. 26.

[10]Mitchel *v.* Reynolds (1711) 1 P. Wms. 181.

[11]Nordenfeld *v.* Ammunition Co., L. R. [1894] A. C. 535; Navigation Co. *v.* Winsor (1873) 20 Wall. 64; Diamond Match Co. *v.* Roeber (1887) 106 N. Y. 473.

[12]This test has been extended to cases of lessor and lessee, Compress Co. *v.* Anderson (1907) 209 U. S. 423, but the principle is the same.

[13]*Cf.* Packet Co. *v.* Bay (1906) 200 U. S. 179.

[14]221 U. S. at p. 58.